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No. 15-118

IN THE

Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

vs.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Mexican citizen lacked Fourth Amendment protections.

2. Whether the court of appeals erred in concluding that any substantive-due-process right under the Fifth Amendment was not clearly established.

3. Whether the claim in this case may be asserted under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

This brief *amicus curiae* will address only Question 3.

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 4

Argument 5

I

A judicially created implied cause of action for damages arising directly under the Constitution does not extend to claims arising in a foreign sovereign to a noncitizen with no connection to the United States 5

A. Development of *Bivens* 5

B. Implied causes of action are disfavored ... 10

II

Special factors heavily dictate against creating a new cause of action 14

Conclusion 19

TABLE OF AUTHORITIES

Cases

Alexander v. Sandoval, 532 U. S. 275 (2001) 12

Ashcroft v. Iqbal, 556 U. S. 662 (2009) 12

Ashwander v. Tennessee Valley Auth., 297 U. S. 288 (1936) 11

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388 (1971) 3, 5, 6, 9, 11, 12

Bush v. Lucas, 462 U. S. 367 (1983) 7, 8

Carlson v. Green, 446 U. S. 14 (1980) 6, 7

Chappell v. Wallace, 462 U. S. 296 (1983) 8, 17

Correctional Services Corp. v. Malesko, 534 U. S. 61 (2001) 8, 9, 12, 13

Davis v. Passman, 442 U. S. 228 (1979) 6

Department of the Navy v. Egan, 484 U. S. 518 (1988) 17

FDIC v. Meyer, 510 U. S. 471 (1994) 8

Graham v. Connor, 490 U. S. 386 (1989) 10

Hernández v. United States, 757 F. 3d 249 (CA5 2014) 2, 3, 13, 14, 15

Hernández v. United States, 785 F. 3d 117 (CA5 2015) 3

Kiobel v. Royal Dutch Petroleum, Co., 569 U. S. __, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013) 15, 16

Meshal v. Higgenbotham, 804 F. 3d 417 (D.C. Cir. 2015) 15, 16

Minneci v. Pollard, 565 U. S. 118 (2012) 8, 12

Schweiker v. Chilicki, 487 U. S. 412 (1988) 8, 13

Sosa v. Alvarez-Machain, 542 U. S. 692 (2004) 15

Stoneridge Inv. Partners v. Scientific Atlanta, Inc., 552 U. S. 148 (2008) 12

United States v. Stanley, 483 U. S. 669 (1987) 8

United States v. Verdugo-Urquidez, 494 U. S. 259 (1990) 17, 18

Wilkie v. Robbins, 551 U. S. 537 (2007) 8, 11, 14, 16, 17

United States Statutes

28 U. S. C. § 1346(b)(1) 14

28 U. S. C. § 1350 ..... 14, 15

28 U. S. C. §§ 2671-2680 14

28 U. S. C. § 2680(h) 14

28 U. S. C. § 2680(k) 15

Pub. L. 93-253, § 2, 88 Stat. 50 (1974) 14

Secondary Authorities

Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 (1994) 11

Kent, Are Damages Different?: *Bivens* and National Security, 87 S. Cal. L. Rev. 1123 (2014) 17

S. Rep. 93-588, 1974 U. S. Code Cong. & Admin. News 2789 14

U. S. Dept. of Justice, Office of Public Affairs, Federal Officials Close Investigation into Death of Sergio Hernandez-Guereca, Press Release (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca 10

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the panel decision in the Fifth Circuit would have allowed the family of an alien with no ties

1. All parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

to the United States, who was likely participating in an illegal alien smuggling operation, to force an agent of the Border Patrol into litigation over an incident that had already been investigated by the Department of Justice and found to be a use of force consistent with the policy and training of his agency. Such an unwarranted expansion of the dubious *Bivens* rule would chill the enforcement of America's border security, contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Petitioners are the parents of 15-year-old Sergio Adrian Hernández Guereca ("Hernández"). *Hernández v. United States*, 757 F. 3d 249, 255 (CA5 2014). The petitioners allege that Hernández, a citizen and resident of Mexico, and his friends were gathered on the Mexican side of a culvert located near the Paso del Norte Bridge in El Paso, Texas. *Ibid.*, and n. 1. They claim the teens were merely playing a game, running up and back down the incline of the culvert and touching the barbed wire fence that separates Mexico and the United States. *Id.*, at 255.

United States Border Patrol Agent Jesus Mesa, Jr. arrived at the scene and detained one of Hernández's friends. *Ibid.* Hernández ran and stood behind a pillar of the Paso del Norte bridge in Mexico to observe. *Ibid.* While standing in the United States, Agent Mesa fired his gun at Hernández, shot across the border and struck and killed Hernández. *Ibid.*

The U. S. Department of Justice investigated the incident and reached very different conclusions. At the time of the shooting, Hernández and his friends were human smugglers attempting an illegal border crossing. See Respondent Mesa's Brief on the Merits 1. While Agent Mesa attempted to detain Hernández's friend,

the teens hurled rocks at Agent Mesa at close range. *Id.*, at 2. See also *infra*, at 9, n. 6.

Petitioners sued Agent Mesa and others in Federal District Court claiming, among other contentions, that Agent Mesa was personally liable under *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), for violating Hernández's rights under the Fourth and Fifth Amendments. *Hernández*, 757 F. 3d, at 255. The District Court dismissed all the claims against Agent Mesa. *Id.*, at 256. A divided panel of the Fifth Circuit affirmed in part and reversed in part. The panel majority found that (1) the Fifth Amendment applied outside the boundaries of the United States for the benefit of a noncitizen, *id.*, at 272; (2) the rule of *Bivens* should be extended to this new context, *id.*, at 277; and (3) that the conduct *alleged* by Hernández, a supposedly unprovoked shooting, should not qualify for qualified immunity. See *id.*, at 279-280.[2] The panel therefore reversed the dismissal of the Fifth Amendment claim against Agent Mesa.

The Fifth Circuit reheard the case en banc and in a *per curiam* opinion affirmed the district court judgment of dismissal in its entirety. *Hernández* v. *United States*, 785 F. 3d 117, 121 (CA5 2015). The en banc court was unanimous that extraterritorial application of the Fifth Amendment in these circumstances was not clearly established for the purpose of qualified immunity. See *id.*, at 120-121.

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2. It bears emphasis at this point that this is a mere allegation, not by any means a fact. Cases such as this involve real people with reputations at stake, and opinions should designate allegation as allegations, not "assumed facts."

SUMMARY OF ARGUMENT

Judicially created implied causes of action for damages arising directly under the Constitution are a relic of the past. Thirty-seven years of this Court's precedents dictate that *Bivens* should be confined to its "precise circumstances." This case falls outside of *Bivens'* narrow scope because it involves a claim of undue force stemming from an act that occurred on foreign soil against a noncitizen with no connection to the United States. Creating a new implied cause of action is not an "automatic entitlement," and this Court has consistently refused to extend *Bivens* liability to new contexts or new categories of defendants.

Federal tort remedies are created by Congress, not the judiciary. Congress has not created a remedy for cross-border shootings by federal officials. Bedrock principles of separation of powers dictate that it is not within the purview of the judicial branch to create a cause of action that implicates foreign policy where one does not otherwise exist.

Special factors counsel against commissioning a new cause of action in the circumstances presented by this case. Congress, not the judiciary, is the proper political branch to decide if noncitizens can recover damages for tortuous government conduct occurring in a foreign country.

ARGUMENT

I. A judicially created implied cause of action for damages arising directly under the Constitution does not extend to claims arising in a foreign sovereign to a noncitizen with no connection to the United States.

A. Development of Bivens.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971), this Court created an implied private cause of action for damages against federal officials who allegedly violated an individual's constitutional rights while acting under color of federal law in his or her own capacity, despite the lack of express statutory or constitutional authority to do so. Webster Bivens alleged that several agents of the Federal Bureau of Narcotics entered his New York apartment without a warrant, "manacled" him in the presence of his wife and children, and conducted an exhaustive search of his premises. *Id.*, at 389.[3] Mr. Bivens alleged he was arrested and transported to the federal courthouse in Brooklyn where he was interrogated, booked, and strip searched. *Ibid.* Despite the availability of state tort law remedies, Mr. Bivens filed suit in Federal District Court against the narcotics agents for the violation of his Fourth Amendment rights and sought money damages from each of them individually. *Id.*, at 389-390.

Noting the general principle that persons who have been injured should have a remedy, and finding "no special factors counselling hesitation in the absence of affirmative action by Congress[,]" *id.*, at 396, this Court found that Mr. Bivens was "entitled to redress his

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3. Because the case was dismissed pretrial, these are allegations, not facts.

injury through a particular remedial mechanism normally available in the federal courts" if he could demonstrate that the federal agents violated his Fourth Amendment rights. *Id.*, at 397 (citing *J.I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964)).

Several years later, this Court was asked if *Bivens'* implied cause of action and damages remedy under the Fourth Amendment can also be implied directly under the Due Process Clause of the Fifth Amendment. *Davis* v. *Passman*, 442 U. S. 228 (1979). In that case, Ms. Davis brought suit against then-Congressman Passman alleging his conduct discriminated against her on the basis of her sex in violation of the Equal Protection component of the Due Process Clause. *Id.*, at 230, 235. This Court again looked at the lack of express prohibition by Congress on the subject and utilized its broad remedial authority to "use any available remedy to make good the wrong done" thus permitting Ms. Davis to proceed with her employment discrimination claim. *Id.*, at 245-248 (quoting *Bell* v. *Hood*, 327 U. S. 678, 684).

Soon after *Davis* was decided, this Court was again asked if a *Bivens*-type cause of action and remedy could be implied against federal prison officials who allegedly failed to provide medical attention to an asthmatic prisoner in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. *Carlson* v. *Green*, 446 U. S. 14, 16, and n. 1 (1980). By this point, this Court assumed that *Bivens* established a general rule that tort claimants have the right to bring a cause of action and recover damages against federal officials who violated their constitutional rights

unless an exception applies. See *id.*, at 18-19.[4] "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Ibid.* This Court limited the right, however, by laying out two situations that may defeat a *Bivens* action:

> "The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.' [Citations.] The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.*, at 18-19.

Finding that neither situation applied, this Court again permitted the claim to proceed.[5] See *id.*, at 19-23.

After *Carlson*, it appeared as if a *Bivens*-type cause of action and remedy would be routinely applied to nearly all alleged constitutional violations by a federal agent. However, starting with *Bush* v. *Lucas*, 462 U. S. 367 (1983), this Court began its retreat from the doctrine and has steadily declined to fashion an implied constitutional damages remedy to any other new context that has come to this Court's attention. In that case, a federal employee claimed a federal employer demoted him in violation of the First Amendment. See *id.*, at 369-370. The Court declined to create a new remedy without statutory authority for this situation.

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4. "Today we are told that a court must entertain a *Bivens* suit unless the action is 'defeated' in one of two specified ways." *Id.*, at 26 (Powell, J., concurring in the judgment).

5. This Court also held that such claims survive the victim's death. *Id.*, at 25.

Id., at 390. The Court has continued that retreat to the present day. See *Chappell* v. *Wallace*, 462 U. S. 296, 297 (1983) (claim by military servicemen that military officers violated various constitutional rights); *United States* v. *Stanley*, 483 U. S. 669, 671 (1987) (military soldier secretly given LSD by government while in military to study the effects of the drug on humans claimed violation of various constitutional rights); *Schweiker* v. *Chilicki*, 487 U. S. 412, 414 (1988) (claim of denial of benefits by Social Security disability benefit recipients violated the Fifth Amendment); *FDIC* v. *Meyer*, 510 U. S. 471, 484 (1994) (suit against federal agency rather than federal agent); *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 70-71 (2001) (prisoner sued a private corporation that operated a half-way house under a contract with the federal Bureau of Prisons for injuries sustained there in violation of the Eighth Amendment); *Wilkie* v. *Robbins*, 551 U. S. 537, 561-562 (2007) (landowner claimed government officials unconstitutionally interfered with his property rights in violation of the Fifth Amendment Takings Clause); *Minneci* v. *Pollard*, 565 U. S. 118, 126 (2012) (a prisoner's Eighth Amendment claims against private prison employees).

In this case, the first question that must be addressed is whether the Petitioners' claims against Agent Mesa are encompassed by this Court's prior holdings in *Bivens*, *Davis*, or *Carlson*. Because *Davis* involved a Fifth Amendment employment discrimination claim and *Carlson* involved an Eighth Amendment cruel and unusual punishment claim, those two cases are factually and legally distinguishable and need not be analyzed any further.

Thus, the inquiry turns to whether Petitioners' claims fall within *Bivens*' narrow scope. Thirty-seven years of this Court's precedents indicate that *Bivens*

should be confined to its "precise circumstances." *Malesko*, 534 U. S., at 75 (Scalia, J., concurring). Thus, if this case is to be encompassed within its familiar context and therefore permit a similar judicially created remedy, it must be sufficiently analogous in order to proceed without further analysis. It is not.

Bivens involved a claim of unannounced, unprovoked intrusion into a U. S. citizen's private residence within the United States borders. Mr. Bivens alleged that despite the lack of probable cause, federal officers restrained him, threatened him and his family, and searched his private dwelling from "stem to stern." *Bivens*, 403 U. S., at 389. He was then arrested, strip searched, interrogated, and jailed. The narcotics agents were acting on their own authority in response to Bivens' "alleged narcotics violations." *Ibid*. This case, on the other hand, involves a federal border patrol agent who allegedly used excessive force in violation of the Fourth Amendment when he shot and killed a Mexican citizen in Mexico who had no ties to the United States.[6] Here, Agent Mesa was reacting to the circum-

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6. Neither criminal nor federal civil rights charges were pursued against Agent Mesa:

> "The Justice Department conducted a comprehensive and thorough investigation into the shooting, which occurred while smugglers attempting an illegal border crossing hurled rocks from close range at a CBP agent who was attempting to detain a suspect. . . . This review took into account evidence indicating that the agent's actions constituted a reasonable use of force or would constitute an act of self defense in response to the threat created by a group of smugglers hurling rocks at the agent and his detainee. . . .
>
> "The Justice Department also concluded that no federal civil rights charges could be pursued in this matter. Under the applicable civil rights statutes, prosecutors must establish, beyond a reasonable doubt, that a law enforcement officer willfully deprived an individual of a constitutional right,

stances presented to him at the moment.[7] Even though both this case and *Bivens* involve Fourth Amendment claims, see *Graham* v. *Connor*, 490 U. S. 386, 395 (1989) (excessive force claims analyzed under the Fourth Amendment), the facts giving rise to this case and the circumstances and context in which this case arose are "fundamentally different," see *Malesko*, 534 U. S., at 70, and are miles apart from *Bivens*. Thus, further analysis is necessary.

B. Implied Causes of Action Are Disfavored.

Because the circumstances of this case do not fall within *Bivens'* narrow reach, the question thus turns to whether this Court should create a new, implied cause

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meaning with the deliberate and specific intent to do something the law forbids. This is the highest standard of intent imposed by law. Accident, mistake, misperception, negligence and bad judgment are not sufficient to establish a federal criminal civil rights violation. After a careful and thorough review, a team of experienced federal prosecutors and FBI agents determined that the evidence was insufficient to prove, beyond a reasonable doubt, that the CBP agent acted willfully and with the deliberate and specific intent to do something the law forbids, as required by the applicable federal criminal civil rights laws." U. S. Dept. of Justice, Office of Public Affairs, Federal Officials Close Investigation into Death of Sergio Hernández-Guereca, Press Release (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-Hernández-guereca (as visited December 29, 2016).

7. We are neither advocating for nor defending against Agent Mesa's actions in this case. Split-second decisions made by law enforcement officers in the heat of the moment are not subject to our second-guessing. Whether Agent Mesa's actions involved something more sinister is unknown and within the purview of the U. S. Department of Justice to assess and determine if criminal charges should be pursued. We are simply advocating for the halt of the creation of new causes of action without congressional authorization.

of action for an alleged "constitutional tort" committed on foreign soil against a noncitizen with no ties to the United States. See *Wilkie*, 551 U. S., at 549 ("The first question is whether to devise a new *Bivens* damages action").[8]

> "[A]ny free standing damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified." *Id.*, at 550.

In *Bivens,* this Court acknowledged that Congress had neither explicitly authorized nor prohibited the recovery of money damages from federal agents who violated an individual's Fourth Amendments rights. 403 U. S., at 396-397. Furthermore, even though "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation," in *Bivens*, this Court created a remedy nonetheless. *Id.*, at 396. This Court stated that because historically the invasion of personal liberty interests were remedied monetarily[9], and that it was " 'well settled that where legal rights have been

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8. Should this Court decide that the claim in this case may not be asserted under *Bivens*, it need not reach the constitutional questions raised by the Petitioners and supporting *Amici*. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander* v. *Tennessee Valley Auth.*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring).

9. The historical remedy was a civil action in trespass, see Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 786 (1994), which would be brought in state court under state tort law.

invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' " *Ibid.* (quoting *Bell* v. *Hood*, 327 U. S. 678, 684 (1946)).

Judicially implied private causes of action were more freely created during the *Bivens* era because this Court was operating under the theory that " 'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001) (quoting *J.I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964)). This view has since been "abandoned" by this Court. See *Malesko*, 534 U. S., at 67, n. 3 (quoting *Alexander*). No longer will this Court recognize the practice of creating implied causes of action to enforce federal rights. See *Stoneridge Inv. Partners* v. *Scientific Atlanta, Inc.*, 552 U. S. 148, 164-165 (2008). "Since our decision in *Borak*, we have retreated from our previous willingness to imply a cause of action where Congress has not provided one. . . . [a]nd have repeatedly declined to 'revert' to 'the understanding of private causes of action that held sway 40 years ago.' " *Malesko*, 534 U. S., at 67, n. 3 (quoting *Alexander*, 532 U. S., at 287).

This Court's reluctance to "revert" to the era of creating implied causes of action to enforce constitutional rights is evident in the cases that have come to this Court's attention after *Carlson*. *Minneci*, 565 U. S., at 124-125. "Since *Carlson*, we have consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U. S., at 68; see also *Ashcroft* v. *Iqbal*, 556 U. S. 662, 675 (2009).

> "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional

> prohibition. . . . [W]e have abandoned that power to invent 'implications' in the statutory field, . . . [and] [t]here is even greater reason to abandon it in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress." *Malesko*, 534 U. S., at 75 (Scalia, J., concurring.)

The context in which this case arose is unlike any other that has come before it. Here, a group of Mexican citizens were gathered on the Mexican side of the U. S.-Mexico border. *Hernández* v. *United States*, 757 F. 3d 249, 255 (CA5 2014). The exact facts that led to the shooting death of Hernández are unclear. The Mexican teens were either playing a "harmless" game of "tag the barbed-wire border fence," *ibid.*, or were involved in a much more perilous illegal border smuggling operation, see *supra*, at 9, n. 6, an activity that the Border Patrol has a duty to stop. Regardless, the factual circumstances undoubtedly present an entirely new context bearing no similarity to *Bivens*. It involves a claim of undue force stemming from an act that occurred on foreign soil against a noncitizen who had no connection to the United States.[10] This Court's precedents dictate against creating a new implied cause of action under these circumstances. *Schweiker*, 487 U. S., at 421 ("Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts").

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10. Petitioners raised claims under both the Fourth and Fifth Amendments. *Id.*, at 267-268.

II. Special factors heavily dictate against creating a new cause of action.

> "[T]he decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. [Citation.] But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Wilkie* v. *Robbins*, 551 U. S. 537, 550 (2007) (quoting *Bush* v. *Lucas*, 462 U. S. 367, 378 (1983).)

In regard to the first question of whether any alternative remedial scheme exists, in Petitioners' initial complaint, they asserted eleven claims against the United States, Agent Mesa, and other unknown federal employees. *Hernández*, 757 F. 3d, at 255. Seven claims were brought under the Federal Tort Claims Act (FTCA), 28 U. S. C. §§ 1346(b)(1), 2671-2680, and one claim was invoked under the Alien Tort Statute (ATS), 28 U. S. C. § 1350. *Hernández*, 757 F. 3d, at 255. When *Bivens* was decided, the FTCA did not provide a remedy for torts committed by federal law enforcement officials. The statute was amended in 1974 to allow plaintiffs to seek damages from the United States for certain torts committed by federal employees. See 28 U. S. C. § 2680(h), Pub. L. 93-253, § 2, 88 Stat. 50 (1974); see also S. Rep. 93-588, 1974 U. S. Code Cong. & Admin. News 2789.

"The FTCA 'is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment.' " *Hernández*, 757 F. 3d, at 257 (quoting *United States* v. *Orleans* 425 U. S. 807, 813 (1976)). However, Congress expressly limited this waiver of sovereign immunity when it excepted "[a]ny claim arising in a foreign country." 28 U. S. C. § 2680(k); *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 700 (2004). Thus, the Fifth Circuit correctly held that the Petitioners are precluded from seeking relief under the FTCA. See 757 F. 3d, at 258.

Furthermore, under the ATS, "[t]he district courts shall have original jurisdiction of any civil action brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350; *Kiobel* v. *Royal Dutch Petroleum, Co.*, 569 U. S. __, 133 S. Ct. 1659, 1663, 185 L. Ed. 2d 671, 679 (2013). The ATS confers statutory jurisdiction only and does not expressly create or authorize a cause of action. *Sosa*, 542 U. S., at 724. Rather, it allows federal courts to recognize private causes of action for a limited number of torts that violate international law. *Ibid.* In *Kiobel*, this Court held that "the presumption against extraterritoriality applies to claims under the ATS" and a "case seeking relief for violations . . . occurring outside the United States is barred." 133 S. Ct., at 1669, 185 L. Ed. 2d, at 685-686. Thus, similar to the FTCA, the tortious conduct must occur within the United States borders.

Bedrock principles of separation of powers dictate that it is "Congress's role, not the Judiciary's, to create and define the scope of federal tort remedies." *Meshal* v. *Higgenbotham*, 804 F. 3d 417, 429 (D.C. Cir. 2015) (Kavanaugh, J., concurring). Congress has deliberately

and expressly excepted the recovery of monetary relief for torts occurring in a foreign country. Petitioners and *Amicus* Sisk argue that because Petitioners are precluded from bringing a statutory cause of action under these circumstances, *Bivens* is the only method in which the Hernández family can obtain relief. Specifically, Professor Sisk states that "[a]micus writes to emphasize one important threshold consideration in resolving the *Bivens* question: the unavailability of an alternative, existing process for protecting the constitutionally recognized interest asserted by petitioners here." Brief for Professor Gregory C. Sisk as *Amicus Curiae* 3.

Putting to one side our disagreement over whether Hernández possessed a "constitutionally protected interest," this Court has explicitly stated that the absence of an alternative remedial scheme is simply one factor the court examines in its overall *Bivens* analysis. See *Wilkie*, 551 U. S., at 550 ("But even in the absence of an alternative [avenue for relief], a *Bivens* remedy is a subject of judgment").

There is no escaping the fact that Congress prohibits monetary recovery for tort claims against the Government that arise in a foreign country due to federal official misconduct. That alone should speak volumes to this Court and should heavily influence whether "special factors" counsel against commissioning a new cause of action in the circumstances presented by this case. Congress has not created a remedy for cross-border shootings by federal officials. But, it has expressly prohibited recovery for tort claims that arose in a foreign country. Congress has the authority to indicate whether it intends federal law to apply to conduct occurring abroad. See *Kiobel*, 569 U. S. __, 133 S. Ct., at 1665, 185 L. Ed. 2d, at 681. It is not up to the judicial branch to create a cause of action that impli-

cates foreign policy where one does not otherwise exist. See *Meshal*, 804 F. 3d, at 420 ("federal tort causes of action are ordinarily created by Congress, not by the courts").

> " 'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf. [Citation.] And Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U. S., at 562 (quoting *Bush*, 462 U. S., at 389).

Furthermore, matters involving foreign policy are the "province and responsibility of the Executive" and judicial intrusion is circumspect absent Congressional authority. *Department of the Navy* v. *Egan*, 484 U. S. 518, 529 (1988) (quoting *Haig* v. *Agee*, 453 U. S. 280, 293-94 (1981)).

In *Chappell* v. *Wallace*, 462 U. S. 296 (1983) and *United States* v. *Stanley*, 483 U. S. 669 (1987), this Court was asked to extend *Bivens* to constitutional torts sustained by soldiers in the course of their military service. In both cases, this Court refused to intrude upon the Congressional and Executive authority over military affairs despite the lack of a "viable cause of action under state or federal law, and no effective remedy from any alternate federal system." Kent, Are Damages Different?: *Bivens* and National Security, 87 S. Cal. L. Rev. 1123, 1151 (2014).

In *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 274-275 (1990), this Court held that the Fourth Amendment does not apply to searches and seizures by United States agents of property located in Mexico and owned by a Mexican citizen. The Court noted that "history

and case law [are] against" such application. *Id.*, at 273. In addition,

> "[t]he United States frequently employs armed forces outside this country — over 200 times in our history — for the protection of American citizens or national security. [Citations]. Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.*, at 273-274.

Although *Verdugo-Urquidez* did not involve a *Bivens* claim, this Court stated in dicta that if it were to find that the Fourth Amendment applied extraterritorially in the circumstances presented in that case, then "aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters." *Id.*, at 274 (citing *Bivens*). This Court further stated that "[p]erhaps a *Bivens* action might be unavailable in some or all of these situations due to 'special factors counseling hesitation,' [citations], but the Government would still be faced with case-by-case adjudications concerning the availability of such an action." *Ibid.*

Special factors heavily dictate against implying a new cause of action to the facts presented in this case. This Court should continue its retreat from implying private causes of action directly under the Constitution, continue to limit *Bivens*, *Davis*, and *Carlson* to those specific circumstances, and follow the precedent announced in *Sosa*, *Kiobel*, and *Verdugo-Urquidez*. Congress, not the judiciary, is the proper branch to decide if noncitizens can recover damages for tortuous government conduct occurring in a foreign country.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

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